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No. 84-204

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MICHAEL TOBRINER, *et al.*,
Petitioner,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF CONCORD
Respondents.

On Petition for a Writ of Certiorari To the California Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari in this Court to review the decision of the California Court of Appeal which upheld the trial court's order granting a motion for new trial made by the Redevelopment Agency of the City of Concord, California ("Agency"). The California Supreme Court denied review of the Court of Appeal decision. This case is an eminent domain proceeding in which the Agency is condemning existing parking easements and related rights over an unused portion of a shopping center parking lot so as to allow extinguishment of the easements and con-

struction of a building on the parking lot. The easements ran in favor of the tenants and owners of various parcels of land (or dominant tenements) in the shopping center.

The rights taken were created by three recorded documents, one of which, entitled "Grant of Easements and Parking Agreement," is attached to the Petition for Writ of Certiorari as Appendix E. The rights created under those agreements are appurtenant to the individual dominant tenements in the shopping center. The Agency is not condemning the land underlying the easements (the servient tenement). Rather, the Agency brought this action in order to allow the owner of the underlying land to develop it and put it to more productive use.

The dispute in this case has centered on the manner in which the taken easement and related rights are to be valued. The trial court and the California Court of Appeal, in upholding the trial court, both followed well-established judicial rules and held that the value of the easements and related rights is to be measured by the decrease or diminution in value of the dominant tenement as a result of the taking. The Petitioners have, on the other hand, made the novel argument that they are entitled to compensation based on the value of the land underlying the easement (or servient tenement).

The Petitioners seek a hearing here on the grounds that the federal Constitution requires that this court create a uniform rule that easements and related rights which are condemned be valued based on the value of the underlying land. As Part II of this brief indicates, there already is a uniform rule, conforming to constitutional standards, for valuation of easements and related rights. That rule was

followed by the California Court of Appeal in this case. Therefore, even if one accepts Petitioners' contention that such a national uniform rule is necessary, such a rule already exists and is contrary to Petitioners' position here.

The Petitioners also seek review of the lower courts' decision in this case regarding the "blight" aspects of the public purpose for the condemnation. However, as we point out below, Petitioners are precluded from challenging the findings of blight made in connection with adoption of the Agency's redevelopment plan because they failed to challenge those findings within the constitutionally valid limitations period provided under California law. Even if they were not so precluded, there is no doubt in this case that there is a proper and justifiable public purpose for the condemnation.

II

ARGUMENT

A. The Valuation Issues in This Case Do Not Require This Court's Action to Secure Uniformity

The thrust of Petitioners' appeal to this Court is that there is a need for national uniformity with regard to standards for valuation of the type of property interests taken in this case.

The reality, however, is that there already is national uniformity regarding valuation of the interests taken here, as best evidenced by Petitioners' inability to cite a single case of any federal or state court which is at odds with the opinion of the California Court of Appeal in this case. The reality is that what Petitioners truly seek here is adoption of an unprecedented and unjustified rule of valuation which

is not constitutionally mandated and which has never been and should never be adopted by any court.

This Court, the courts of California and other states and the Restatement of Property have firmly established a rule of valuation that, when appurtenant easements are taken, compensation is to be measured by the diminution in value of the dominant tenement as a result of the taking. *United States v. Welch,* 217 U.S. 33 (1910); *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189 (1910); *Hemmerling v. Tomlev,* 67 Cal. 2d 572 (1967); Restatement of Property Section 508.

Contrary to Petitioners' statements in their petition, there is no suggestion in the opinion of the California Court of Appeal or in any of the other cases considering existing appurtenant easements that valuation is to be based on anything other than principles of just compensation as measured by fair market value, considered in light of what a willing buyer would pay to a willing seller. Thus, if property with access to the public roads via an access easement has a fair market value of $100,000, and that property will have a fair market value of only $75,000 if that access easement is condemned, then the diminution in value of the property as a result of the elimination of the access easement is $25,000. The diminution in value is based on the fair market value of the property before and after the condemnation.

To avoid the inevitable conclusion that the California Court of Appeal applied the correct and well-established rules for valuation of easements, Petitioners point to the covenants in the Grant of Easements and Parking Agreement (Appendix E to the Petition for Writ of Certiorari)

which restrict use of the land burdened by the parking easement. Then, by wild analogy to *Penn Central Transportation Company v. New York City,* 434 U.S. 104 (1978), Petitioners claim that the combination of an easement and a restriction on use requires a different method of valuation than set forth by the California Court of Appeal because such a combination somehow gives Petitioners the right to develop the land which was subject to the easement and restriction.[1]

This contention does not add anything to Petitioners' plea. Petitioners do not own the land which was, prior to this taking, subject to the easement and restriction. And there is nothing in the Grant of Easement and Parking Agreement which even remotely suggests that Petitioners have the right to purchase, own or develop that land. That agreement establishes the parking easements as "perpetual," contains no provisions relating to economic or planning aspects of developing the parking lots and requires the unanimous consent of the approximately 150 owners and tenants in the shopping center to amend the agreement. See Appendix E to Petition for Writ of Certiorari at Paragraphs 1, 10. The Grant of Easement and Parking Agreement was quite clearly intended to preserve the parking areas for parking and to perpetually prevent development of those parking areas by Petitioners, the fee owner, or anyone else. Unless this Court is prepared to create an entirely new and previously unheard of form of property which somehow is created when an easement and a use

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[1]The *Penn Central* case does not involve condemnation of existing easements or restrictions, and the "development rights" discussed in that case do not arise from the presence of easements or restrictions.

restriction exist in tandem, the presence in this case of both an easement and a use restriction does not give rise to "development rights" of the sort Petitioners claim.

Moreover, the fact that there is a use restriction in combination with the easement does not alter the applicable rules for valuation of what has been taken in this case. The California Court of Appeal followed the rule of every jurisdiction in this nation regarding valuation of existing building restrictions, that "the owner of the land for whose benefit the restrictions were imposed is entitled to compensation for damage to the dominant estate, measured by the diminution in value of that property as a result of the taking. Thus, if a building restriction is taken, compensation is measured, as in the case of an easement, by the damage to the dominant tenement resulting from the loss of the restriction." Appendix A to Petition for Writ of Certiorari at 11.

Every court which has considered this valuation question has concluded that compensation is to be measured by the decrease in value of the benefitted property due to the condemnation of the restriction. See *United States v. Certain Land in City of Augusta,* Maine, 220 F.Supp. 696 (D. Me. 1963); *Town of Stanford v. Vuono,* 108 Conn. 359, 143 A. 245 (1928); *Horst v. Housing Authority of Scots Bluff,* 184 Neb.215, 166 N.W.2d 119 (1969); *Meredith v. Washoe County School Dist.,* 84 Nev. 15, 435 P.2d 750 (1968); *State v. Orenstein,* 124 N.J. Super. 295, 306 A.2d 479 (1973); *School Dist. No. 3 v. Country Club of Charleston,* 241 S.C. 215, 127 S.E.2d 625 (1962).

Whether the taken property rights are considered as easements, restrictions, or both, it is clear that the proper

and uniformly followed measure of value when such rights are taken is the decrease in value of the dominant tenement. There is no need, therefore, for this Court to act to secure uniformity.

B. The Acquisition Was for A Proper Public Purpose and Did Not Violate Due Process of Law

Petitioners also challenge the statute of limitations set forth in California Health & Safety Code Section 33501 as a violation of due process of law. That section is part of the California Community Redevelopment Law, a comprehensive legislative scheme for planning and implementing redevelopment of blighted areas. California Health & Safety Code Sections 33000-33855. Under the California law, a redevelopment agency formulates and then implements a plan to eliminate blighting physical, social and economic influences. Prior to adoption of the plan, a public hearing is held. California Health & Safety Code Sections 33348, 33360. Prior to the public hearing, every owner of property in the area governed by the plan must receive written notice of hearing and notice that his or her property may be subject to acquisition by eminent domain. California Health & Safety Code Sections 33349, 33350.

The redevelopment plan and the findings made in connection with its adoption must be challenged within sixty days of the adoption of the redevelopment plan. California Health & Safety Code Section 33501. This statute of limitations is necessary in order to insure that the plan can be implemented in a rational and comprehensive manner. If the plan could be challenged several years after it was adopted, it would be extremely difficult to finance and implement the plan, because the redevelopment agency would

always run the risk that the project would be disrupted by a later court challenge of the plan. The redevelopment agency would be unable to make or obtain the long term financing and construction commitments necessary to carry out a comprehensive redevelopment plan, if those commitments could be subsequently undercut by later challenges to the plan.

The legislative scheme under the California redevelopment law is one in which the public use issues of blight must be challenged at the time the determinations regarding blight are made at the time the redevelopment plan is adopted.[2] *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 37-42 (1964). The statutory scheme is one which afforded Petitioners and others in their position with reasonable and adequate notice, hearing, and judicial review rights before the redevelopment plan was adopted and implemented. In these circumstances, the sixty-day statute of limitations on judicial challenges to the redevelopment plan and the findings made in connection with its adoption does not violate constitutional guarantees of due process of law. See *Logan v. Zimmerman,* 455 U.S. 422, 437 (1982); *Electrical Workers v. Robbins & Meyers, Inc.,* 429 U.S. 229, 243-44 (1976); *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945); *Yakus v. United States,* 321 U.S. 414, 425-36 (1944).

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[2]The sixty-day statute of limitations does not preclude later claims that the redevelopment plan is not being implemented in the manner contemplated by the plan. *Redevelopment Agency v. Herrold,* 86 Cal.App.3d 1024 (1978). In addition, before a redevelopment agency can bring an eminent domain action, it must give the prospective condemnee a hearing at which the condemnee may urge that his or her property not be taken. California Code of Civil Procedure Section 1245.235.

Moreover, even if we assume that Petitioners' "property" in the redevelopment area cannot be considered blighted, it does not mean that there is no public use in this case. If a blighted area is to be redeveloped in an effective and integrated manner, it is often necessary to include in the redevelopment area and subject to redevelopment some individual parcels which may not be blighted. California Health & Safety Code Section 33321 specifically authorizes inclusion of unblighted property in a redevelopment area so long as blighting conditions predominate in the area. The courts have upheld this inclusion of unblighted property in redevelopment areas, recognizing that such inclusion is often necessary if redevelopment is to be successful. *Berman v. Parker,* 348 U.S. 26, 35 (1954); *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 49-50 (1964). In addition, it is undisputed that the property burdened by the taken easements was an unsightly and unused parking lot at the time the redevelopment plan was adopted and remained in that state at the time this action was commenced.

Petitioners' claim that a condemnation of this type is not for a public purpose has been decisively rejected by prior decisions of this Court. In *Berman v. Parker,* supra, this Court made clear that the redevelopment process, including the exercise of the power or eminent domain to forward a redevelopment project, is invested with sufficient public purpose to withstand constitutional challenge. And in *Hawaii Housing Authority v. Midkiff,* ..... U.S. ....., 104 S. Ct. 2321 (1984), this Court made clear that the courts should give broad deference to legislative judgments regarding the public purpose for exercise of the power of eminent domain.

In this case, the Agency found that the economic and physical condition of the shopping center would be served by the elimination of outdated easements and restrictions which served only to preserve unused and unsightly parking lots. The Agency's decision is not one "palpably without reasonable foundation." *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2329. Thus, even if Petitioners could succeed in avoiding the statute of limitations in the California redevelopment law, there still would be no basis for claiming that this condemnation lacks sufficient public purpose under the Constitution. Because there is no serious issue regarding the public purpose for the taking, this is not a case which demands this Court's attention.

III

CONCLUSION

For the reasons stated above, the Respondent, Redevelopment Agency of the City of Concord, urges the Court to deny the Petition for Writ of Certiorari.

Dated: September 5, 1984

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